No. 88-1103

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Petitioners,

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement Pursuant to Rule 28.1

A. New York State Urban Development Corporation

Non-Wholly owned subsidiaries:

1. Apollo Theatre Redevelopment Corporation -
   Parent Companies: New York State Urban Development Corporation and Harlem Urban Development Corporation.

2. New York Convention Center Development Corporation -
   Parent Companies: New York State Urban Development Corporation and Triborough Bridge and Tunnel Authority.

3. New York State Mortgage Loan Enforcement and Administration Corporation -
   Parent Companies: New York State Urban Development Corporation and New York State Project Finance Agency.

B. Times Square Redevelopment Corporation

Parent Company: New York State Urban Development Corporation (Note: the Times Square Redevelopment Corporation was dissolved on September 29, 1986).

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This brief is submitted on behalf of the New York State Urban Development Corporation, the Times Square Redevelopment Corporation, and Robert M. Hall (collectively, "UDC"); all other New York State respondents; and the New York City respondents (collectively, the "respondents") in opposition to the petition of Stephen F. Wilder et al. (the "petitioners") for a writ of certiorari to the United States Court of Appeals for the Second Circuit (the

"Petition"). The petitioners seek review of the portion of the Second Circuit's opinion and judgment in Wilder v. Thomas, 854 F.2d 605 (2d Cir. 1988) (PA 1-30)[1], that precluded them from relitigating under the Clean Air Act (the "CAA"), 42 U.S.C. §§ 7401 et seq., issues that had already been fully and fairly addressed in state administrative proceedings pursuant to New York's State Environmental Quality Review Act ("SEQRA"), N.Y. Envtl. Conserv. L. §§ 8-0101 et seq., and three levels of state court review.

In the only part of the decision contested by the petitioners, the Second

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[1]"PA __" identifies citations to the Appendix attached to the Petition. "RA__" refers to the Appendix submitted by the respondents and attached to this brief. The corresponding pages of the Joint Appendix submitted to the Second Circuit in this case are identified by "[JA __]" in the respondents' Appendix.

Circuit merely applied New York's established doctrine of collateral estoppel to the specific facts of this case to dispose of three of the petitioners' six claims. The holding of the case is therefore narrowly confined to the facts presented below. Because the Second Circuit's opinion presents no conflict with either the decisions and policies of this Court or decisions of other federal courts of appeals, this Court should deny the petition for a writ of certiorari.

A. Environmental Review and Approval of the Project

This case is one of 41 lawsuits that "seek to forestall construction of the proposed 42nd Street Development Project ("the [P]roject") in New York City." Wilder v. Thomas, 854 F.2d at 607

(PA 1-2).[2] The Project, a joint effort by UDC and the City of New York, includes construction of four major office buildings, a hotel, a wholesale mart, restaurants, retail spaces, and ancillary parking facilities; renovation of eight historic theaters; and modernization of the Times Square subway station. The goals of the Project are to eliminate the blight, physical decay, and crime that characterize West 42nd Street and to restore the area as an economically

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[2]Every lawsuit decided to date has either been dismissed or resolved in favor of the Project. In two prior cases decided by the Second Circuit, the plaintiffs (including some of the petitioners in this action) also sought review by this Court. In both instances, the petitions for writs of certiorari were denied. See Rosenthal & Rosenthal v. New York State Urban Development Corp., 605 F. Supp. 612 (S.D.N.Y.), aff'd, 771 F.2d 44 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986); G&A Books, Inc. v. Stern, 604 F. Supp. 898 (S.D.N.Y. 1985), aff'd, 770 F.2d 288 (2d Cir.), cert. denied, 475 U.S. 1015 (1986).

productive entertainment and commercial center. See Jackson v. New York State Urban Development Corporation, 67 N.Y.2d 400, 411-12, 494 N.E.2d 429, 503 N.Y.S.2d 298, 301-02 (1986).

Before approving the Project, UDC was required to comply with several New York statutes, including SEQRA. Pursuant to SEQRA, UDC issued a draft environmental impact statement ("DEIS") in February 1984. Thereafter, extensive public hearings were conducted, and written comments on the DEIS were received and reviewed. See Jackson, 67 N.Y.2d at 412, 494 N.E.2d 429, 503 N.Y.S.2d at 302. Based on these 240 written and oral public submissions, UDC revised the Project's overall environmental analysis and issued a final environmental impact statement ("FEIS") containing more than 1,000 pages of text, tables, figures,

and illustrations. See id. Although not required by SEQRA to do so, UDC solicited written comments on the FEIS as well. See id.

The FEIS focused heavily on the Project's traffic and air quality impacts. In particular, it described in detail the methodology employed in predicting impacts of the Project on carbon monoxide concentrations in the Project area. UDC assumed "worst case" traffic and air quality conditions for this analysis, which was carried out for two separate parking scenarios (one with 320 parking spaces in the Project and the other with 920 spaces). See RA 23. In carrying out this air quality analysis, UDC compared the Project's anticipated "worst case" impacts both against expected carbon monoxide concentrations in the absence of the Project

and against the national ambient air quality standards ("NAAQS") for carbon monoxide established by the federal Environmental Protection Agency ("EPA") pursuant to the CAA.[3] The FEIS concluded that, provided UDC approved an extensive series of transportation-related measures designed to mitigate traffic and air quality impacts of the Project, the Project with 320 parking spaces would not cause any violation of the 9 ppm NAAQS for carbon monoxide. See RA 2-3, 5-10.

UDC's Directors, to whom the FEIS and the comments thereon were submitted for review, incorporated the recommended

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[3]For the purposes of this dispute, the relevant NAAQS for carbon monoxide, as established by EPA, is nine parts per million (9 ppm) over an eight-hour period. See 40 C.F.R. § 50.8(a)(1) (1988). An additional standard, which the Project also met, is 35 ppm for a one-hour period. See id. at § 50.8(a)(2).

transportation-related mitigation measures into the Project. See Wilder v. Thomas, 854 F.2d at 611 (PA 9). They then specifically found that, with such mitigation measures, the completed Project would cause no violations of the 9 ppm NAAQS for carbon monoxide.[4]

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[4]After issuance of the FEIS, but before Project approval, UDC added 25 more parking spaces under the wholesale mart included in the Project. See RA 22. Before incorporating this change into the Project, however, UDC conducted a detailed Environmental Assessment and determined that the inclusion of 25 additional parking spaces would have no significant impacts on traffic or air quality and would continue to satisfy the 9 ppm NAAQS for carbon monoxide. As explained further below, the inclusion of these additional 25 parking spaces was also fully litigated through three tiers of state courts in a lawsuit challenging the adequacy of UDC's traffic and air quality analysis and its mitigation measures. See Rosenthal v. New York State Urban Development Corp., No. 3020/85 (Sup. Ct. N.Y. Cty. June 25, 1985), aff'd in part and modified in part sub nom. Jackson v. New York State Urban Development Corp., 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985), aff'd, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

See PA 108. On October 4, 1984, after making this and other detailed environmental findings, UDC's Directors approved the Project.[5] See Wilder v. Thomas, 854 F.2d at 610 (PA 8).

The New York City Board of Estimate then conducted public hearings on the Project, and on November 9, 1984, also approved the Project. See id. at 611 (PA 10). In its resolution of approval, the Board of Estimate expressly concurred in and adopted UDC's environmental

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[5]The petitioners' statement of the facts materially misrepresents the Project's air quality impacts (as indisputably disclosed in the FEIS), and, as a result, the issues before the courts below. As the petitioners' counsel knows, the 9.3 ppm carbon monoxide concentration referred to on page 7 of the Petition is for the Project with 920 parking spaces, which was not adopted by UDC's Directors. By contrast, the Project that was approved (with 345 parking spaces) was found to satisfy the 9 ppm standard. See RA 2-3. Even during construction, there is no longer any possibility of the Project's exceeding the NAAQS. See id. at 3-4.

findings, including the finding that with the mitigation measures identified in the FEIS, the NAAQS for carbon monoxide would not be violated by the approved Project.[6] See id.

B. State Court Proceedings

After approval of the Project, various of the petitioners in this case, their corporate entities, or their counsel brought 13 separate lawsuits in connection with the Project.[7] In par-

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[6]The petitioners do not, because they cannot, cite any authority for their false claim that the New York City Department of Environmental Protection ("DEP"), which also reviewed the Project's FEIS, found that violations of the NAAQS would persist after completion of the Project, even with mitigation measures. See Petition, at 7-8. DEP in fact found that the Project would meet the NAAQS even during its construction period. See RA 13-19.

[7]These suits, in addition to the SEQRA proceeding discussed below, include: seven state court proceedings pursuant to SEQRA, New York's Eminent Domain Procedure Law, the New York

(continued...)

ticular, they commenced a state court proceeding challenging UDC's approval of the Project on the grounds that it violated SEQRA. The principal SEQRA claim was a challenge to the adequacy of the FEIS traffic and air quality analysis and related mitigation measures, including an allegation that the FEIS analysis was wrong in concluding that the Project would not cause violations of the 9 ppm NAAQS for carbon monoxide.

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[7](...continued)
State Urban Development Corporation Act, or New York City's Uniform Land Use Review Procedure; five state court proceedings seeking production of documents pursuant to New York's Freedom of Information Law; and a federal court action alleging a violation of the United States Constitution. A 14th suit, challenging the Project's subway improvements, was filed just two weeks ago. See Broadway Plus Corp. and Rosenthal & Rosenthal, Inc. v. Metropolitan Transportation Authority of the State of New York, et al., No. 1447/89 (Sup. Ct. N.Y. Cty. filed January 20, 1989).

After extensive briefing and oral argument, the New York State Supreme Court dismissed all the traffic and air quality claims and remanded two non-traffic claims to the agency. On cross-appeals, a unanimous panel of the Appellate Division, First Department, specifically upheld the FEIS traffic and air quality analysis, and dismissed the entire lawsuit. That dismissal was then unanimously affirmed, in a lengthy opinion, by the New York State Court of Appeals. See Jackson, supra, aff'g 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985), aff'g in part and modifying in part Rosenthal v. New York State Urban Development Corp., No. 3020/85 (Sup. Ct. N.Y. Cty. June 25, 1985).

C. Federal District Court Proceedings

The day after the Appellate Division dismissed this SEQRA challenge, the

petitioners filed their first complaint in this action. That complaint alleged that the Project would cause violations of the NAAQS for carbon monoxide or would interfere with reasonable further progress in achieving compliance with the NAAQS. The respondents moved to dismiss the complaint on the basis of res judicata and collateral estoppel, as well as the well established rule barring CAA citizen suits alleging direct violations of the NAAQS. The respondents pointed out that a citizen suit is permissible under the CAA only if it alleges violations of an "emission standard or limitation," 42 U.S.C. § 7604, such as "a specific strategy or commitment" in the EPA-approved State Implementation Plan ("SIP") adopted by a state to achieve compliance with the NAAQS. Council of Commuter Organizations

v. Metropolitan Transportation Authority, 683 F.2d 663 (2d Cir. 1982); see Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 197-98 (7th Cir.), cert. denied, 107 S. Ct. 169 (1986); Action for Rational Transit v. West Side Highway Project, 669 F.2d 614 (2d Cir. 1983); League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1173 (9th Cir.), cert. denied, 444 U.S. 943 (1979). Without reaching the res judicata or collateral estoppel issues, the district court (Griesa, J.) dismissed the complaint, which it found to be a "waste of [the court's] time," RA 12, for failure to allege any violation of New York's SIP. On its own motion, the court gave the petitioners leave to replead if they could allege specific violations of the SIP attributable to the Project.

The petitioners then submitted a proposed amended complaint, purporting to allege violations of the SIP resulting from the Project. The district court found that the proposed amended complaint also failed to state a claim because the supposed violations were: (1) really alleged violations of the NAAQS, rather than of the SIP, and thus were not judicially cognizable; (2) not pleaded with the specificity required by the Second Circuit in Council of Commuter Organizations and Action for Rational Transit; (3) in the case of the petitioners' challenge to UDC's traffic mitigation measures, already decided adversely to the petitioners by the New York Court of Appeals in Jackson; and (4) in the case of reporting provisions allegedly violated by the City and State respondents (though not by UDC), not enforce-

able by means of a citizen suit. Having twice failed to frame a legally sufficient set of claims under the CAA, the petitioners were denied permission to file and serve the amended complaint. The petitioners appealed that decision to the Second Circuit.

D. The Second Circuit's Decision

The Second Circuit affirmed the order of the district court. In affirming the denial of permission to file the proposed amended complaint, the Second Circuit held that: (1) the petitioners' first claim merely restated their improper challenge to compliance with the NAAQS; (2) the third and sixth claims alleged violations of requirements not in fact imposed by the SIP; and (3) the petitioners' second, fourth, and fifth claims -- the only claims at issue in this petition -- were barred

under the doctrine of collateral estoppel.[8]

The court correctly stated that New York law imposed two requirements for application of collateral estoppel: first, "there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling." Wilder v. Thomas, 854 F.2d at 617 (PA 20-21) (quoting Schwartz v. Public Administrator of the County of Bronx, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969)). The court found that, on the

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[8]The petitioners' request for a rehearing of the entire case by the Second Circuit was denied on September 7, 1988.

facts of this case, both requirements were satisfied.

The court found the petitioners were trying to relitigate the adequacy of UDC's traffic mitigation measures -- the very issue they had already litigated in the state courts -- in the guise of challenging alleged violations of the SIP. The different standards contained in SEQRA and the CAA did not preclude a finding of identity of issue in this case because UDC (during its approval process and in its FEIS) and the parties (in their pleadings and arguments before both the state and federal courts) had consistently looked to the NAAQS as the standard that must be attained by the Project. "Thus, even if UDC could have applied a less stringent standard to satisfy SEQRA's requirements, it did not in fact do so." Wilder v. Thomas,

854 F.2d at 619 (PA 25) (emphasis added). Moreover, because both the parties and the courts relied on the NAAQS in evaluating UDC's compliance with SEQRA, "the adequacy of the mitigation measures under the CAA was, as a practical matter, a necessary component in the state court's decision." Id. at 620 (PA 26).

The Second Circuit also found that the petitioners had a full and fair opportunity to litigate the adequacy of the mitigation measures. The court noted initially that, even if the issue had first been raised in federal court pursuant to the CAA, review of the sufficiency of the mitigation measures would have been identical to that undertaken by the state courts. This was so because the SIP itself had designated the SEQRA EIS process as the primary mechanism by which New York was to

evaluate the air quality impacts of individual projects and because the standards for review of agency determinations in New York State and in the federal courts are essentially the same. Id. at 619 (PA 25). Thus, the petitioners received the same hearing pursuant to SEQRA, and the same review by the courts, that they would have received if they had initially brought their claims pursuant to the CAA. Second, UDC's use of the federal NAAQS when conducting the environmental review pursuant to SEQRA meant that "the differences in applicable law [were] a matter of form rather than substance." Id. at 620 (PA 27). These two facts, in conjunction with a variety of additional factors (including the fact that the petitioners were represented by the same counsel in both state and federal

courts),[9] persuaded the court that the second requirement for application of collateral estoppel had also been satisfied in this case.

As the above discussion shows, the Second Circuit's holding as to the second, fourth, and fifth claims was extremely narrow. The Second Circuit's opinion nowhere asserts, or even implies, that SEQRA review generally bars all claims pursuant to the CAA, as the petitioners would have this Court believe. To the contrary, the Second Circuit carefully confined its holding to the particular facts of this case, where UDC incorporated the NAAQS into the SEQRA process, which was specifically designated in the New York SIP as the primary mechanism for air quality review. Under these circumstances, where both

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[9] See id.

the federal and state standards and the federal and state procedures for assessing air quality impacts had effectively been rendered identical, and where the adequacy of that assessment had been upheld by three tiers of state courts applying virtually the same standard of review as the federal courts, the court found the petitioners collaterally estopped from asserting CAA claims challenging the FEIS conclusion that the Project would not result in any violations of the carbon monoxide (or any other) NAAQS.[10] A decision as

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[10]Both the district court and the Second Circuit determined that the petitioners' fourth and fifth claims, although dressed up in different garb, essentially raised complaints about the adequacy of mitigation measures and the sufficiency of the FEIS. See Wilder v. Thomas, 659 F. Supp. at 1511 (PA 50), aff'd, 854 F.2d at 621 (PA 29). These claims, as well as the second claim, were therefore properly precluded by the state court litigation. Moreover, the

(continued...)

limited and fact-bound, and as clearly correct, as this one does not merit review by this Court.

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[10](...continued)
district court found that, to the extent that the fourth and fifth claims alleged the failure of state and city agencies to submit adequate reports to the EPA, those claims were not cognizable under the CAA citizen suit provision. See id. at 1510-11 (PA 50).

REASONS FOR DENYING THE WRIT

POINT I

THIS CASE IS FACT-BOUND AND RAISES NO GENERAL POINT OF LAW

The petitioners in this case seek review only of that portion of the Second Circuit's decision holding them collaterally estopped from asserting their second, fourth, and fifth CAA claims. The petitioners do not contest the Second Circuit's articulation of the doctrine of collateral estoppel under New York law. Rather, they challenge the court's findings that: (1) the petitioners already litigated in state court the identical issue they seek to litigate in federal court, namely the adequacy of the Project's FEIS, see Petition at 10-13; (2) this issue was necessarily decided by the state court, see Petition at 13; and (3) the petitioners had a full and fair oppor-

tunity to litigate this issue in state court, see Petition at 15-16. In other words, the petitioners concede that the Second Circuit applied the correct general rule of collateral estoppel, as it is firmly established in New York law, but dispute the court's application of the rule to the specific facts of this case. The application of a well established rule to the facts peculiar to a single case is not a matter worthy of a writ of certiorari. See Supreme Court Rules, Rule 17(1).

In an attempt to manufacture an issue worthy of review by this Court, the petitioners repeatedly stretch the Second Circuit's holding far beyond its actual scope. The petitioners pretend that the Second Circuit introduced a general legal principle that all CAA claims are barred by the prior litigation

of SEQRA claims. See Petition at 13, 14. Resolution of the questions presented by this case did not require so sweeping a pronouncement, however, and the Second Circuit therefore properly refused to make it. Indeed, the Second Circuit expressly acknowledged that "the SEQRA standard . . . does not, on its face, embody the absolute requirement that the NAAQS be attained," Wilder v. Thomas, 854 F.2d at 618 (PA 24), and therefore SEQRA litigation would not necessarily preclude CAA claims. Nevertheless, the Second Circuit determined that UDC's utilization of the federal 9 ppm standard for carbon monoxide in this particular case rendered the difference between the two statutory stan-

dards of no practical significance.[11] See id. at 618-19 (PA 24-25).

The Second Circuit's opinion not only does not declare the far-reaching and novel legal principle attributed to it by the petitioners but contains

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[11]UDC's FEIS utilized the 9 ppm carbon monoxide NAAQS in order to ensure compliance with section 3.6(A) of the New York SIP, which provides in relevant part:

> [I]f an EIS for a project proposal identifies a violation . . . of the carbon monoxide standard, then the City commits to assure that mitigating measures will be implemented by the Project sponsor or City, so as to provide for attainment of the standard by December 31, 1987 and maintenance of it thereafter.

PA 82 (emphasis added). The petitioners fail to quote the underlined portion of this provision, which conditions mitigation on the finding of a violation. See PA 4. Because the FEIS identified no violation of the carbon monoxide NAAQS, UDC and the City could approve the Project, as planned, without further mitigation (beyond that already incorporated into the Project) and without any conflict between UDC's SEQRA and SIP obligations.

unmistakable indications that the Second Circuit would reject such a principle. The court repeatedly refers to specific facts that ensured that the petitioners' proposed claims pursuant to the CAA had already been fully and fairly litigated in the state proceedings challenging UDC's compliance with SEQRA. Central among these facts are: (1) UDC's utilization of the federal NAAQS when conducting environmental review of the Project pursuant to SEQRA, (2) the New York SIP's provision for using the SEQRA process as the primary mechanism for assessing air quality impacts of a project, and (3) the virtual identity of the New York State and federal standards for reviewing administrative determinations. The clear implication of the Second Circuit's analysis is that where these facts do not obtain, CAA claims

would not be barred. Collateral estoppel could properly be applied in this case, however, because the environmental review of the Project conducted pursuant to SEQRA incorporated federal standards for air quality and determined that those standards were in fact satisfied by the Project.

The petitioners' protestations that the Second Circuit's decision "creates several areas of nonuniformity in the national administration of the Clean Air Act," Petition at 15, can now be recognized as utterly preposterous. The decision does not determine the federal standard under the CAA by reference to a state standard, as the petitioners claim, see id. at 15, 19; rather, it permits SEQRA litigation to bar the petitioners' citizen suit claims pursuant to the CAA only because, as

contemplated by the SIP, UDC incorporated the federal standard into the state air quality review. Because the Second Circuit's holding applies only when state agencies apply the NAAQS in their own environmental review, the decision presents no threat to consistent enforcement of the CAA.

POINT II

THE DECISION IN THIS CASE DOES NOT CONFLICT WITH DECISIONS IN OTHER FEDERAL CIRCUIT COURTS

The petitioners could not begin to find conflicts between the decision in this case and those in other federal circuit courts without baldly misstating the Second Circuit's holding, as they have done here. Once the actual scope of the Second Circuit's decision is understood, the alleged conflicts immediately evaporate.

The petitioners claim that the Second Circuit applied the SEQRA standard to the CAA claims. See Petition at 15, 19. The truth is precisely the reverse: UDC applied the NAAQS throughout the SEQRA process, as it was required to do under the SIP. UDC and the City of New York did not seek merely to minimize air quality impacts; nor did they balance

social or economic considerations against the value of clean air. Indeed, they had no reason to do so because the 920-parking-space alternative (to which the Petition refers, on page 7, in citing a carbon monoxide concentration of 9.3 ppm) was not part of the Project. UDC and the Board of Estimate approved the Project, with 345 parking spaces, only upon finding that it would in fact comply with the NAAQS -- and three levels of state courts upheld that determination in finding that UDC's traffic and air quality analysis complied fully with the requirements of SEQRA. Because the petitioners could not challenge UDC's compliance with the SIP -- which itself mandated UDC's use of the SEQRA process -- without relitigating precisely the same issues already fully and fairly litigated in the state courts, the

Second Circuit correctly recognized that the petitioners' CAA claims were barred.

Because the Project was found to meet the NAAQS, neither UDC, the district court, nor the Second Circuit was called upon to decide whether economic or social considerations are cognizable in CAA enforcement proceedings. This question was simply not raised by the Project, included in any pleading, briefed or argued by any party, or discussed in either the district court or Second Circuit opinions. Because the Second Circuit did not (and, on these facts, could not) reach this issue, the decision in this case presents no conflict with decisions of other courts resolving the question either

way. Because the alleged conflict is entirely illusory, the petition for a writ of certiorari should be denied.

POINT III

THE DECISION IS NOT INCONSISTENT WITH DECISIONS OR POLICIES OF THIS COURT

The petitioners also claim that the Second Circuit's decision is inconsistent with Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). See Petition at 15-16. In Kremer, this Court recognized that "judicial affirmance of an administrative determination is entitled to preclusive effect." 456 U.S. at 481 n.21. This Court also emphasized that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." Id. at 481. The petitioners do not contest the constitutionality of the state administrative and judicial proceedings. Thus, the very case with which the

petitioners claim this case is inconsistent, is actually authority supporting the Second Circuit's decision.

The petitioners pretend to find an inconsistency by noting that the administrative determination in Kremer followed a hearing in which the "complainant [sic] had an opportunity 'to rebut evidence submitted [to] or obtained from the respondent.'" See Petition at 16 (quoting Kremer, 456 U.S. at 483). They claim that they did not receive a full and fair opportunity to litigate their claims because they did not receive a trial-type hearing before the administrative agency. See Petition at 15-16. They argue that when the agency does not act in an adjudicatory capacity, state proceedings are not entitled to full faith and credit.

As the Second Circuit pointed out, however, the petitioners would not be entitled to an evidentiary hearing even if their CAA claims were allowed. Because the SIP designates the SEQRA process as the mechanism for CAA review, the federal court, like the state courts, would review UDC's findings to determine "whether the agency has complied with the applicable law, identified the relevant areas of environmental concern, taken a 'hard look' at them and made a reasoned elaboration of the basis for its determinations." Jackson, 110 A.D.2d at 307-08, 444 N.Y.S.2d at 703; see Wilder v. Thomas, 854 F.2d at 610 (PA 24)(quoting Kleppe v. Sierra Club, 429 U.S. 390, 410 n.21 (1976) ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences.")); see also

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983); New York v. Kleppe, 427 U.S. 1307, 1311 (1976). Moreover, "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." Kremer, 456 U.S. at 483. The petitioners have received the only hearing to which they are entitled, and, under Kremer, the judicial affirmance of the results of that hearing precludes relitigation of the claims adjudicated in the state proceedings.

The petitioners' argument that the Second Circuit's decision will induce (New York) litigants to bypass state remedies and to channel environmental litigation into the federal courts also rests on the erroneous assumption that federal litigants would be entitled to

an evidentiary hearing. They claim that "it would be a rare litigant that would forego [sic] the benefits of a full evidentiary hearing in federal court . . . for a deferential review of the administrative record in state court . . . ." See Petition at 24. Citizens filing suit in federal court to enforce compliance with the New York SIP in circumstances such as these would not be entitled to an evidentiary hearing because "SEQRA's EIS process was designated in the SIP as the primary mechanism for indirect source review." Wilder v. Thomas, 854 F.2d at 619 (PA 25). Therefore, the Second Circuit's decision provides no incentive for bypassing state court remedies.

The "bypass" argument also presupposes the accuracy of the petitioners' misstatement of the Second Circuit's

holding. Once again, the petitioners insist that the Second Circuit is permitting every SEQRA action to preclude all CAA claims. See Petition at 22. The Second Circuit did not endorse such a broad proposition. Indeed, the opinion suggests that when a state EIS prepared pursuant to SEQRA reveals a violation of the NAAQS, litigants will have available both SEQRA and CAA actions. Therefore, the Second Circuit's decision is not inconsistent with this Court's policy that federal remedies should supplement, not supplant, state court remedies.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Dated: New York, New York
February 2, 1989

Respectfully submitted,

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7001:001

APPENDIX

[JA 465]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8356 (TPG)

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Plaintiffs,

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; JOSEPH T. McGOUGH, JR., as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Defendants.

AFFIDAVIT OF IRWIN FRUCHTMAN
IN SUPPORT OF MOTION DISMISS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

IRWIN FRUCHTMAN, being duly sworn, deposes and says:

1. I am Vice-President-Construction of defendant

[JA 466]

Times Square Redevelopment Corporation ("TSRC"), a subsidiary of the New York State Urban Development Corporation ("UDC"), created to assist UDC in carrying out the 42nd Street Development Project (the "Project"). I am fully familiar with the facts set forth below and submit this affidavit in support of the motion of UDC and TSRC to dismiss the complaint in this action.

2. Before assuming my present duties, I served as Vice-President-Construction of UDC from December 1984 to June 1985, and as Vice-President of TSRC until December 1984. In my earlier position at TSRC, my principal responsibility was to supervise the environmental analysis of the Project, including preparation of both the draft environmental impact statement and final environmental impact statement ("FEIS") prepared by UDC in discharge of its responsibilities under the New York State Environmental Quality Review Act ("SEQRA").

3. The FEIS includes a detailed analysis of the Project's air quality impact at the time of its scheduled completion in 1991. That analysis, which was subjected to extensive public comment in accordance with SEQRA, concludes that the Project will result in no violation of applicable national ambient air quality standards ("NAAQS") promulgated by the Environmental Protection Agency ("EPA") under the Clean Air Act (the "Act"). Attached as Exhibit A hereto is Table 5-3, included in the FEIS, summarizing the Project's expected

[JA 467]

carbon monoxide impacts after giving effect to the detailed mitigation measures incorporated in the Project.[1] This table indicates that at *no* location will the completed Project, as approved,

[1] The table shows projections for the Project with 320 parking spaces, which is the number included in the Project as approved. An alternative with 920 spaces was not adopted by UDC.

cause carbon monoxide levels to exceed the applicable 8-hour standard of 9 parts per million ("ppm") adopted by EPA under the Act.

4. As part of its overall SEQRA responsibilities, UDC also analyzed the environmental impacts of the Project's construction phase. This analysis included, among other factors, an assessment of air quality impacts during construction. Attached as Exhibit B is Table 3-4, also included in the FEIS, summarizing expected carbon monoxide levels during the Project's construction phase in 1988. That table indicates that the 9 ppm standard will not be exceeded at any of the Project's air quality locations, with one possible exception. Because of uncertainty at the time the FEIS was prepared about the precise construction scenario, the document did indicate a conditional exceedance at Broadway and 41st Street (which would have been caused by a temporary traffic detour to permit renovation of the Times Square subway station). However, the FEIS made clear that even this exception was "unlikely." This was so, according to the FEIS,

[JA 468]

because exceedance of the 9 ppm standard would occur only if construction on the Project's "Site 1" had been completed by 1988. But if that Site is instead an empty lot in 1988 (which the FEIS indicated was the more likely circumstance), the FEIS reported that carbon monoxide levels at even that location "would not exceed 6.0 ppm." FEIS at 3-26. (A copy of the section of the FEIS that includes page 3-26 is attached as Exhibit C hereto).

5. Since completion of the FEIS and approval of the Project by UDC, UDC has continued to review and refine its construction plans for the Project. As a result of that review, as well as the delays attributable to prolonged litigation challenging the Project, it is now certain that construction on Site 1 will not be completed by 1988 (although demolition of existing structures on that Site is expected to be complete by 1988). As a result, the "unlikely" construction scenario referred to in the FEIS is not expected to occur, and thus the possible temporary exceedance of

the 9.0 ppm carbon monoxide standard referred to in the FEIS is not expected to occur either.

/s/ Irwin Fruchtman

Sworn to before me this
6th day of February, 1986.

/s/ Joseph C. Petillo

Notary Public

JOSEPH C. PETILLO
NOTARY PUBLIC, State of New York
No. 31-4834610
Qualified in New York County
Commission Expires March 30, 1987.

Table 5-3

MAXIMUM ONE- AND EIGHT-HOUR PREDICTED
CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1991 WITH THE PROJECT*
320 ON-SITE SPACES WITH MITIGATION

		One-Hour			Eight-Hour		
Receptor	Location	HIWAY	APRAC	SONDEL**	HIWAY	APRAC	SONDEL**
1	40th St. between 7th & 8th Aves.	7.3	8.5	14.0	4.6	5.4	8.5
2	41st St. between 7th & 8th Aves.	6.3	6.7	8.2	4.0	4.3	5.1
3	42nd St. between 7th & 8th Aves.	9.8	10.9	N/A	6.3	7.0	N/A
4	43rd St. between 7th & 8th Aves.	7.3	8.4	N/A	4.6	5.4	N/A
5	43rd St. between Broadway & Ave. of the Americas	7.2	7.3	N/A	4.6	4.6	N/A

* All values are given in parts per million (ppm). The values presented are the second highest for the year, since standards may be exceeded once a year.

** Where theoretically applicable.

Exhibit A

Table 5-3

MAXIMUM ONE- AND EIGHT-HOUR PREDICTED
CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1991 WITH THE PROJECT*
320 ON-SITE SPACES WITH MITIGATION

		One-Hour			Eight-Hour		
Receptor	Location	HIWAY	APRAC	SONDEL**	HIWAY	APRAC	SONDEL**
6	8th Ave. between 41st & 42nd Sts.	10.5	9.9	N/A	6.7	6.3	N/A
7	7th Ave. between 42nd & 43rd Sts.	10.7	10.4	N/A	6.9	6.7	N/A
8	Broadway between 42nd & 43rd Sts.	7.6	7.3	14.1	4.8	4.6	8.6
A	Intersection of 8th Ave. & 42nd St.	12.4	N/A	N/A	8.0	N/A	N/A
B	Intersection of 7th Ave. & 42nd St.	13.3	N/A	N/A	8.6	N/A	N/A
C	Intersection of Broadway & 42nd St.	11.5	N/A	N/A	7.4	N/A	N/A

* All values are given in parts per million (ppm). The values presented are the second highest for the year, since standards may be exceeded once a year.

** Where theoretically applicable.

Exhibit A

Table 3-4
MAXIMUM ONE- AND EIGHT-HOUR PREDICTED CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1988 WITH THE PROJECT* 320 ON-SITE SPACES WITH MITIGATION

Receptor	Location	One-Hour			Eight-Hour		
		HIWAY	APRAC	SONDEL**	HIWAY	APRAC	SONDEL**
1	40th St. between 7th & 8th Aves.	7.9	9.1	14.9	5.0	5.8	9.0
2	41st St. between 7th & 8th Aves.	7.0	7.2	10.2	4.4	4.6	6.3
3	42nd St. between 7th & 8th Aves.	10.6	11.7	N/A	6.8	7.5	N/A
4	43rd St. between 7th & 8th Aves.	8.1	9.2	N/A	5.1	5.9	N/A
5	43rd St. between Broadway & Ave. of the Americas	7.9	9.4	N/A	5.0	6.0	N/A

* All values are given in parts per million (ppm). The values presented are the second highest concentrations for the year since standards can be exceeded once a year.

** Where theoretically applicable.

*** This concentration would occur between 41st and 42nd Streets, but only if Site 1 is built before Site 12. If Site 12 is built first, Site 1 will be an empty lot in 1988 and, as a result, no SONDEL canyon will exist. Under such circumstances, eight-hour concentration at the Broadway receptor would be less than 9.0 ppm.

Exhibit B

Table 3-4

MAXIMUM ONE- AND EIGHT-HOUR PREDICTED CARBON MONOXIDE CONCENTRATIONS IN THE YEAR 1988 WITH THE PROJECT* 320 ON-SITE SPACES WITH MITIGATION

Receptor	Location	One-Hour			Eight-Hour		
		HIWAY	APRAC	SONDEL**	HIWAY	APRAC	SONDEL**
6	8th Ave. between 41st & 42nd Sts.	11.8	11.2	N/A	7.6	7.2	N/A
7	7th Ave. between 42nd & 43rd Sts.	12.5	11.5	N/A	8.0	7.4	N/A
8	Broadway between 42nd & 43rd Sts.	9.2	9.2	16.5	5.9	5.9	10.0***
A	Intersection of 8th Ave. & 42nd St.	13.8	N/A	N/A	8.9	N/A	N/A
B	Intersection of 7th Ave. & 42nd St.	13.9	N/A	N/A	9.0	N/A	N/A
C	Intersection of Broadway & 42nd St.	12.6	N/A	N/A	8.1	N/A	N/A

* All values are given in parts per million (ppm). The values presented are the second highest concentrations for the year since standards can be exceeded once a year.

** Where theoretically applicable.

*** This concentration would occur between 41st and 42nd Streets, but only if Site 1 is built before Site 12. If Site 12 is built first, Site 1 will be an empty lot in 1988 and, as a result, no SONDEL canyon will exist. Under such circumstances, eight-hour concentration at the Broadway receptor would be less than 9.0 ppm.

Exhibit B

[JA 471]

Carbon Monoxide Concentrations in the Project Area

Tables 3-3, 3-4 and 3-5 show maximum predicted one-and eight-hour carbon monoxide concentrations at each of the 11 receptor locations in the year 1988, with and without the project, both for the 320 and 920 parking space scenarios.

Table 3-6 summarizes the maximum predicted eight-hour carbon monoxide concentrations, using consistent models, at each receptor location in 1988 without the project and with the project with mitigation, and indicates for each location the incremental change due to the project with mitigation.

As can be seen from these tables, there are no violations of the one-hour standard. However, there are several instances where carbon monoxide concentrations exceed 9.0 parts per million over eight hours.

Specifically, without the project, eight-hour violations are shown at Receptor Locations 1 (40th Street), 6 (Eighth Avenue), A (Intersection of Eighth Avenue and 42nd Street) and B (Intersection of Seventh Avenue and 42nd Street). At 40th Street (where the violation is shown only with the SONDEL model), the predicted concentrations under worst case meteorological conditions are 10.1 ppm, while at Eighth Avenue, the predicted concentrations using APRAC are 9.9 ppm. At the Seventh and Eighth Avenue intersections, the predicted concentrations under worst case meteorological conditions are 9.7 and 10.6 ppm, respectively.

With the project and the 320 parking space scenario, with one exception, there are no violations at the intersections or at any of the Avenue or cross-street receptor locations. Using the SONDEL model, however, there is one instance—on Broadway (Receptor Location 8)—where an eight-hour concentration in excess of 9 ppm is shown. There, the predicted 1988 concentration, with worst case meteorological and peak traffic conditions, is 10.0 ppm compared to 8.3 ppm without the project. This is

a significant difference, but it is a temporary condition resulting from a construction situation. More specifically, as noted in Subsection F above, in 1988, construction work may

[JA 472]

still be underway on the Times Square subway station, resulting in the continued closing of three lanes of Seventh Avenue between 41st and 42nd Streets. This, in turn, requires that some traffic be diverted down Broadway as far as 41st Street to avoid the construction bottleneck; and it is this diversion that results in the reading of 10.0 ppm under worst-case meteorological conditions. This situation is expected to persist for about a year, but once the subway work is complete, the diversions will end and so will the elevated levels of carbon monoxide.

Furthermore, the 10 ppm reading is itself unlikely. This is the case because in 1988, Site 1 will probably be an empty lot, with no construction expected there until 1989. If this is so, a SONDEL canyon will not exist at the receptor location, due to the large open area between 41st and 42nd Streets. As a result, ventilation will be greatly improved and eight-hour CO concentrations would not exceed 6.0 ppm.

With the project and the 920 space parking scenario, the situation would be the same as for the 320 space scenario, with one exception: on 40th Street, an eight-hour concentration of 10.1 ppm is predicted under worst-case meteorology. This is the same as the predicted concentration without the project and thus would not make the situation any worse than it would otherwise be; nor would it be a legal impediment to the project under the State indirect source permit regulations. Nonetheless, if it were subsequently deemed desirable to build as many as 920 on-site spaces, some additional mitigation would probably be advisable. This could be accomplished, for example by phasing in parking spaces between 1988 and 1991 or by restricting the number of available parking spaces when adverse meteorological conditions are predicted.

[JA 497]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8356 TPG

STEPHEN T. WILDER, et al.,

Plaintiff,

v.

LEE M. THOMAS, et al.,

Defendant.

June 26, 1986

2:45 p.m.

(Case called; both sides ready)

THE COURT: The reason I called you together is that in struggling with these motions I suddenly remembered that there is something called a motion for a more definite statement and I honestly must say that I think at least as to some of the defendants that would have been the

[JA 498]

appropriate motion because the complaint is far from definite and it make it difficult for a defendant to really know what the claim is that is being dealt with and it certainly makes it difficult for me to know what I am dealing with.

Now, I just want to give you a little illustration and what I am leading up to is I am not deciding any motion now. It has been a waste of my time and my office's time to have to deal with such a complaint and

(Continued on next page)

[JA 499]

it was a waste of the defendant's time to have to deal with such a complaint and perhaps they should have thought of the motion for a more definite statement. But the real vice was to have a complaint which is so lacking in any clear definition of what the claim is.

Now, I would like to just illustrate this: There is in the plaintiff's memorandum, dated January 21, 1986, a section entitled plaintiff's may maintain a citizens suit against the state and city defendants because they are violating the SIP. There is a section of about 10 pages beginning at page 28. Then there is a kind of rambling discussion in of ways in which the SIP is violated, mainly by reference to a letter from the EPA to the Department of Environmental Conservation dated August 2, 1985. It's as if the EPA is the plaintiff and of course the EPA is not the plaintiff here. But in this kind of loose way that the plaintiff's use in their presentation there is the discussion in the brief, mainly a quotation from this letter.

[JA 607]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 8356 (TPG)

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Plaintiffs,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; JOSEPH T. McGOUGH, JR., as Commissioner of the Department of Environmental Protection; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Defendants.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HARVEY W. SCHULTZ, being duly sworn, deposes and says:

1. I am the Commissioner of the New York City Department of Environmental Protection. I am familiar with the facts set forth below and submit this affidavit in opposition to plaintiffs' application to amend their complaint in this action and to correct certain misstatements contained in plaintiff's memorandum in support of their application to amend.

[JA 608]

2. Plaintiffs have suggested that the City is failing to carry out measures required by the New York State Implementation Plan ("SIP") to eliminate carbon monoxide "hot spots" by the end of 1987. To the contrary, the City, through its Departments of Environmental Protection and Transportation, has been engaged in a vigorous program to identify candidate hot spots, evaluate those at which control measures will be required to meet all applicable carbon monoxide standards (including, in particular, the 8-hour standard of 9 ppm) and implement the control measures which are determined to be necessary to achieve that standard. The review of final environmental impact statements ("FEISs") for individual development projects to be undertaken in the City is a part, but only a part, of that process. The bulk of the City's efforts are directed towards the hot spot locations themselves, because any given hot spot site is a result of a far more complex aggregation of factors than simply one single project.

3. As part of this ongoing process of monitoring and reporting contemplated by the SIP, the City has recently submitted to the United States Environmental Protection Agency ("EPA") its 1985 drafts of two documents: (a) a report on "Reasonable Further Progress in 1985 Toward Attainment of Carbon Monoxide Standards annexed hereto as Exhibit A, and b) a report on the "Carbon Monoxide Control Program For Group IV Hotspot Sites," annexed hereto as Exhibit B. Together, these reports evaluate the effectiveness of the steps taken to date to deal with hot spots around the City, and also identify control measures to be implemented with respect to hot spots that have been more recently identified.

[JA 609]

4. The Group IV Hotspot Report specifically addresses a location at which the FEIS on the 42nd Street Development Project (the "Project") indicated the possibility of a temporary construction period exceedance of the carbon monoxide standard: Broadway between 42nd and 43rd Streets. The data developed for the FEIS were reanalyzed using the Mobile 3 computer model, the most current air quality model approved by EPA for this purpose and one which has become available for use in New York City after completion of the Project EIS. Using that model, the Report demonstrates that the worst 8-hour carbon monoxide concentration, without any additional mitigation beyond that contemplated by the Project itself, would be 8.6 ppm, below the applicable standard of 9.0 ppm. Accordingly, this site was determined to be one at which the implementation of addition control measures, beyond those committed to as part of the Project itself, will not be required. *See* Group IV Hotspot Report at Table I and III, pages 3 and 5.

5. The 1985 Reasonable Further Progress Report also discusses, among other things, the proposed 42nd Street Transitway. The Report indicates that the environmental impacts of the Transitway are now being reviewed, and that a draft environmental impact statement ("DEIS") is expected to be completed by December 1986. This DEIS will evaluate the air quality impacts of the proposed Transitway, including the possibility that traffic diversion which it causes could result in a significant increase in carbon monoxide concentrations at certain locations. Implementation of the Transitway proposal is contingent on the DEIS findings as to the Transitway's air quality impacts. As part of its base case, the Transitway

[JA 610]

DEIS will have to assume and take into account the completed 42nd Street Project, including the Project's mitigation measures.

6. Plaintiffs allege that the City has failed to commit to mitigation of the Project's air quality impacts. This is erroneous.

The City, a co-sponsor of the Project with the New York State Urban Development Corporation, formally approved the Project through Board of Estimate action on November 9, 1984. When the Board of Estimate approved the Project, it explicitly resolved that it "concurs in and adopts the UDC Findings," which were defined to include those findings made by UDC under the State Environmental Quality Review Act. *See* Board of Estimate Resolution, annexed hereto as Exhibit C, at pages 2-3, 9. The UDC findings, in turn, included the identification of mitigation measures necessary to avoid adverse air quality impacts from the Project. *See* UDC Findings, annexed hereto as Exhibit D, at pages 23, 26-27. Thus, the mitigation measures identified by UDC were a condition of City approval of the Project, and the City has committed to their implementation.

/s/ HARVEY W. SCHULTZ

Sworn to before me this

5th day of September, 1986

/s/ RICHARD E. JOSEPH
NOTARY PUBLIC

[notary public stamp illegible]

THE CITY OF NEW YORK

NEW YORK STATE IMPLEMENTATION PLAN

CARBON MONOXIDE CONTROL PROGRAM

FOR GROUP IV HOTSPOT SITES

Exhibit B

TABLE III

RE-ANALYSES OF HOTSPOT SITES IDENTIFIED IN 1984 FEISs USING MOBILE 3

HOTSPOTS SITES	Volume (Veh./Hr)	Speed (mph)	Worst 8hr CO AQ Impact W/O Mitigation (ppm)	Worst 8hr CO AQ Impact With Mitigation	Models Used For Analyses	Name of Project
1. 14th St. at Broadway	768 EB 609 WB	5.4 EB 8.2 WB	6.1	–	Mobile 3 Hiway 2	Klein Development at Union Square
2. Third Ave. 17-18 Sts.	1108 NB 748 SB	3.9 NB 11.8 SB	8.0	–	Mobile 3 Hiway 2	Klein Development at Union Square
3. Third Ave, 64-65 Sts.	2403	7.5	7.6	–	Mobile 3 Aprac	51 Story Building at 3rd Ave, & 64th St.
4. Broadway, 42nd-43rd Sts.	1180	9.6	8.6	–	Mobile 3 Sondel	42nd St. Development
5. Lexington Ave., 52-53rd Sts.	1454	4.1/6.0	11.9	8.9	Mobile 3 Sondel	Cadillac Fairview
6. 52nd St. Lexington to 3rd Aves.	598	5.0	8.7	–	Mobile 3 Sondel	Cadillac Fairview
7. 53rd St., Lexington to 3rd Aves.	584	6.2	7.3	–	Mobile 3 Sondel	Cadillac Fairview
8. 6th Ave. at 42nd St.	2134	4.1	9.4	8.4	From FEIS	Bryant Park Restaurant & Restoration

TABLE III

RE-ANALYSES OF HOTSPOT SITES IDENTIFIED IN 1984 FEISs USING MOBILE 3

HOTSPOTS SITES	Volume (Veh./Hr)	Speed (mph)	Worst 8hr CO AQ Impact W/O Mitigation (ppm)	Worst 8hr CO AQ Impact With Mitigation	Models Used For Analyses	Name of Project
9. 5th Ave. at 42nd St.	2097	4.7	9.2	8.5	From FEIS	Bryant Park Restaurant & Restoration
10. West St., Laight to Vestry Sts.	3842 NB 2306 SB	6.6/7.2 9.3/9.9	10.7	9.2	Mobile 3 Hiway 2	Washington St. 6th Amended Plan
11. West St., Warren to Chambers Sts.	3483 NB 2208 SB	5.1/10.0 18.1/19.0	11.1	8.0	Mobile 3 Hiway 2	Washington St. 6th Amended Plan
12. Canal St., Lafayette to Broadway	1383 EB 885 WB	3.1 EB 11.3 WB	7.5		See RFP for 1985, App. B	Washington St. 6th Amended Plan
13. Church & Chambers Sts.	Chambers WBW-CH 441 CH-BW 485 BW-CH 519 CH-WBW 474 Church 1500	 6.9 EB 3.4 EB 3.1 WB 6.4 WB 6.8 NB	8.8	—	Mobile 3 Hiway 2	Washington St., 6th Amended Plan

NEW YORK STATE
URBAN DEVELOPMENT CORPORATION

Findings With Respect to
42nd Street Development Project
New York, New York

Part II

STATEMENT OF FACTS AND CONCLUSIONS

A. Proposed Project

4. *Sites Within The Project Area*

The Project area has been divided for planning purposes into 12 separate sites (shown in Exhibit 2 hereto) and three major clusters: the Seventh Avenue/Broadway sites (Sites 1, 2, 3, 4, and 12); the 42nd Street mid-blocks (Sites 5 on the north side of 42nd Street and Sites 6 and 10 on the south side); and Eighth Avenue (Sites 7 and 8). Two other mid-block sites (Sites 9 and 11) contain existing structures which are expected to be retained.

5. *Project Components*

The Project's several components reflect the goals outlined above. These components may be summarized as follows:

On the Seventh Avenue/Broadway Sites (Sites 1, 3, 4 and 12), a total of four new office buildings, ranging in height from 29 to 56 stories and containing approximately 4.1 million gross square feet (including ancillary retail and public space), are proposed to be developed. Additional office space will remain in the Candler Building (Site 11), the Selwyn Building (part of Site 5) and the New Amsterdam Theater (part of Site 6).

[JA 768]

On Sites 5, 6 and 10, the midblock sites, nine theater buildings will be maintained, renovated or otherwise adapted to reuse. As presently contemplated, most of these structures will be returned to legitimate or institutional (non-profit) theater use. However, the Empire (part of Site 10) will be renovated for retail, restaurant, or mart-related conference use, and the Times Square (part of site 5) is planned for retail or restaurant use. The Victory (intended for institutional use) and the Liberty (intended for both institutional and mart related auditorium use) could each be used for first-run movies on an interim basis until theater use becomes feasible. Responsibility for acquiring, renovating and operating each of the theaters will be shared among the office, mart and theater developers (who will contribute funds toward acquisition and renovation) and experienced theater operators. Specific responsibilities, and intended uses, for each of the theaters are summarized in Exhibit 3 hereto.

On Site 7, a new hotel, containing approximately 750 rooms, ancillary facilities, retail uses and up to two cinemas, will be constructed. On Site 8, a wholesale mart will be developed, containing approximately 2.4 million gross square feet devoted to computer and apparel wholesaling, as well as ancillary exhibition space and other support uses. Approximately 1.7 million square feet will be used for computer wholesaling, while approximately 560,000 square feet will be used for apparel wholesaling.

On Sites 9 and 11, the historic Candler Building (Site 11) and the Carter Hotel (Site 9) will remain as part of the Project, with the hotel's 42nd Street entrance incorporated into Site 7. The Project as originally presented proposed to retain and reclad the existing One Times Square building on Site 2. However, the project staff has recommended that the Project be modified to incorporate the alternative of substantially altering or completely replacing One Times Square in order to provide an increased sense of open space and visual focus in the Times Square area,

thereby mitigating to some degree the bulk of the office towers. UDC has determined to accept the staff's recommendation, and the action as approved by UDC includes the substantial alteration or replacement of One Times Square. The further option of

[JA 769]

taking no action at all with respect to One Times Square and permitting the building to remain in its present state has been considered and found to be environmentally acceptable if replacement or substantial alteration proves to be infeasible.

New retail space will be included on virtually all of the 42nd Street blockfaces. In addition, each of the new buildings will contain its own offstreet truck loading bays. Below-grade parking for up to a total of 245 vehicles will be provided under Sites 7 and 12; additional parking (presently intended to be less than 100 spaces) will also be provided under Site 8. (The office developer has indicated it may seek approval for additional parking on sites 3 and 4; if make, such a request will be evaluated in accordance with applicable law and project goals.)

Finally, the Project includes improvements to accommodate increased pedestrian, vehicular and transit traffic and to make access to and use of the subways safer, more convenient and more attractive, including a pedestrian bridge spanning Eighth Avenue between 41st and 42nd Street and linking the mart and the Port Authority Bus Terminal, improvements on the Times Square subway station and a traffic lay-by lane on Eighth Avenue between 40th and 43rd Streets.

Information concerning the proposed design, street-level treatment and lighting of the Project is also set forth in the FEIS.

[JA 784]

Vehicular Traffic. Vehicular traffic has been analyzed for both the project Area and a larger traffic impact zone extending to Sixth and Tenth Avenues and 34th through 48th Streets. These

areas have been studied for three peak periods, midday (12:00 noon to 2:00 p.m.), homebound for P.M. Peak (4:00 p.m. to 6:00 p.m.), and pre-theater (7:00 p.m. to 8:00 p.m.), in each case assuming Wednesday (matinee day) conditions. During each of these periods, the completed Project's 1991 traffic volumes (including autos, taxis, buses, limousines, and trucks) were added to those which would be expected in that year without the Project. This "worst case" analysis was carried out assuming no increase in street capacity; no increased enforcement of traffic regulations; no modification of existing traffic signals or other controls; the inclusion of a new (100- or 700-car) garage under the mart (producing a total of either 320 or 920 parking spaces in the project as a whole); and the active use of *all* theater structures for legitimate or institutional purposes.

Using these assumptions, anticipated 1991 traffic volumes were assigned on an unconstrained basis (that is, assuming no diversion of either Project-generated or base traffic or peripheral arteries or other modes) to individual streets throughout the traffic impact area. The resulting volumes for each link have been translated into a volume-to-capacity (V/C) ratio for that link, for each of the peak hour periods studied. As would be expected, V/C ratios for many links exceed 0.90, signifying serious congestion during the peak hours, and, without mitigation, a number of links within the project area and the theater district exceed 1.00, indicating chronic overloads (at least on matinee days) and upstream queues. As indicated above, under the worst-case assumptions outlined above, such queuing could be expected at Eighth Avenue south of 42nd Street, Seventh Avenue north of 42nd Street, 42nd Street itself, several crosstown streets in the theater and garment districts and, under certain circumstances, 40th Street between Broadway and Eighth Avenue.

To counter these impacts, a series of mitigation measures has been incorporated into the project plan. These measures, the impact of which has been quantitatively evaluated in the same manner as the mitigated traffic impacts discussed above, include (a) a new traffic lay-by lane on the east side of Eight Avenue between 40th and 43rd Streets to provide standing and drop-off space for buses and taxis that now block the eastern lane

of Eighth Avenue for this purpose; (b) a relocation of the Port Authority taxi stand on the west side of Eighth Avenue (combined with an appropriate no standing restriction) to facilitate left turns onto westbound 42nd Street; (c) revised and effectively enforced no standing regulations on Seventh Avenue between 41st and 45th Streets (or, alternatively, a partial re-routing of traffic from Seventh Avenue onto Broadway between 45th and 41st Streets); (d) revised signal timing and no-standing regulations on 42nd Street to facilitate through traffic and right turns onto both Eighth Avenue for westbound vehicles and Seventh Avenue for eastbound vehicles; (e) additional enforcement of the foregoing measures by City traffic control agents, for whom space will be provided within the project area; and (f) revised signal timing on 43rd Street to improve crosstown flows. A number of additional mitigation measures (minor signal timing changes, changes in no-standing regulation and the like) are recommended for several adjacent streets in the garment center and theater district.